No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

BRIEF OF THE STATE OF TENNESSEE AND TWELVE ADDITIONAL STATES AS AMICI CURIAE SUPPORTING RESPONDENTS

W. J. MICHAEL CODY*
Attorney General & Reporter
of the State of Tennessee

JOHN KNOX WALKUP
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General

MICHAEL D. PEARIGEN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-5687

**Counsel Of Record For Amici Curiae*

(Additional States as Amici Curiae on inside cover)

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

28 pp

ADDITIONAL STATES AS AMICI CURIAE

STATE OF CALIFORNIA
John K. Van De Kamp
Attorney General

STATE OF CONNECTICUT
Joseph I. Lieberman
Attorney General

STATE OF IDAHO
Jim Jones
Attorney General

STATE OF ILLINOIS
Neil F. Hartigan
Attorney General

STATE OF IOWA
Thomas J. Miller
Attorney General

STATE OF MISSOURI
William L. Webster
Attorney General

STATE OF NEBRASKA
Robert M. Spire
Attorney General

STATE OF OKLAHOMA
Michael C. Turpen
Attorney General

STATE OF RHODE ISLAND
Arlene Violet
Attorney General

STATE OF SOUTH CAROLINA
T. Travis Medlock
Attorney General

STATE OF SOUTH DAKOTA
Mark V. Meierhenry
Attorney General

COMMONWEALTH OF VIRGINIA
Mary Sue Terry
Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTES:

Federal:

State:

MISCELLANEOUS:

No. 85-1233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDETH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Second Circuit

BRIEF OF THE STATE OF TENNESSEE AND TWELVE ADDITIONAL STATES AS AMICI CURIAE SUPPORTING RESPONDENTS

THE INTEREST OF THE AMICI CURIAE

The amici curiae are the sovereign States of Tennessee, California, Connecticut, Idaho, Illinois, Iowa, Missouri, Nebraska, Oklahoma, Rhode Island, South Carolina, South Dakoka, and Virginia, which file this Brief by and through their respective Attorneys General pursuant to Rule 36.4 of the Rules of the Supreme Court. Each of the *amici* states, in the exercise of their reserved police power, have enacted legislation respect-

ing the protection of the environment for the furtherance of the public health, safety, and welfare.[1]

The Court of Appeals below, in *Ouellette v. International Paper Company*, 776 F.2d 55 (2d Cir. 1985), *aff'g Ouellette v. International Paper Company*, 602 F.Supp. 264 (D. Vt. 1985) ("*Ouellette*"), correctly ruled that the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), authorizes resort to the common law of the state where injury from interstate water pollution occurs. The Seventh Circuit Court of Appeals, however, by holding in *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984) ("City of Milwaukee"), *cert. denied sub nom. Scott v. City of Hammond*, 469 U.S. ____, 105 S.Ct. 979 (1985), that the CWA preempts the application of the law of the state where the injury occurred to out-of-state sources of pollution,[2] has raided the treasury of power reserved to the states.[3]

---

[1] Particularly pertinent are those laws by which the *amici* states seek to protect, preserve, and enhance the quality of their waters. *See, e.g.*, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 *et seq.* As stated in T.C.A. § 69-3-102(a):

> [I]t is declared to be the public policy of Tennessee that the people of Tennessee...have a right to unpolluted waters. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.

Further, pursuant to T.C.A. § 69-3-114(a), causing pollution is declared to be a public nuisance, subjecting the violator to actions for civil penalties, T.C.A. § 69-3-115(a), injunctive relief, T.C.A. § 69-3-117, and, in appropriate cases, criminal sanctions and fines. T.C.A. § 69-3-115(b) and (c).

[2] The Tennessee Supreme Court recently adopted the view of the Seventh Circuit in *State v. Champion International Corp.*, ____ S.W.2d ____, *reported at* 24 Env't.Rep.Cas. (BNA) 1371 (Tenn. 1986) ("Champion"). The State of Tennessee will shortly file a Petition for Certiorari with this Court seeking review of the Tennessee Supreme Court's decision and requesting consolidation with these proceedings.

[3] U.S. Const. amend. X.

The *amici* states have experienced, are experiencing, or are subject to interstate water pollution problems. The resolution of this issue, upon which two Federal Circuit Courts of Appeals are divided, will materially affect the ability of the *amici* states to exercise their inherent police power to protect the water resources and health, safety, and welfare of the people of their states.

For example, Tennessee, which is bordered by eight other states and traversed by numerous interstate rivers and streams, found it necessary to bring suit under Tennessee law in the Tennessee state courts against an out-of-state polluter of its waters.[4] That suit involved the gross and continuing pollution of the Pigeon River, an interstate stream flowing from North Carolina into Tennessee, by the defendant owner and operator of a papermill located in North Carolina a short distance across the state border. The Pigeon River is a premier trout and bass stream in North Carolina above the defendant's papermill. However, the defendant's effluent has turned the Tennessee portion of the Pigeon River into a murky, odorous stream which supports only minimal aquatic life.

The Tennessee Court of Appeals declined to follow the Seventh Circuit Court of Appeals' *City of Milwaukee* decision and held that the CWA *does not* preempt the application of Tennessee's water pollution and nuisance laws to an out-of-state polluter.[5] A divided Tennessee Supreme Court, however, recently reversed the Tennessee Court of Appeals' decision and dismissed the *Champion* suit, holding that the CWA had preempted the application of Tennessee's water pollution and nuisance law to an out-of-state polluter.[6]

---

[4] *State v. Champion International Corp.*, No. 83-1149-I (Tenn. Ch. Ct., filed July 8, 1983).

[5] *See State v. Champion International Corp.*, ____ S.W.2d ____, *reported at* 22 Env't Rep. Cas. (BNA) 1338 (Tenn. App. 1985) ("Champion").

[6] *See* note 2, *supra.*

SUMMARY OF ARGUMENT

The *amici* argue that the *Ouellette* Court reached the correct result in holding that the CWA allows the application of the law of the state where injury from out-of-state pollution occurred, but submit a different rationale from that adopted by the Second Circuit.[7] The *amici* contend that: **(1)** Prior to *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972) ("*Milwaukee I*"), and the federal common law which was thereby created, there was no bar to the application of state law to control interstate water pollution and this Court in *Milwaukee I did not* irreversibly erase this inherent state power *but* merely superseded it; **(2)** This Court, in *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304 (1981) ("*Milwaukee II*"), found that the CWA preempted federal common law but *did not* decide that state law was similarly preempted; **(3)** Upon the demise of federal common law pursuant to *Milwaukee II,* the disability previously imposed by the federal common law upon the states' inherent police power dissipated, *unless* the CWA itself preempts state law; **(4)** There is no indication in the CWA that Congress intended to preempt state law; indeed, the CWA expressly preserves such state law.

[7] The rationale argued by the *amici* is essentially that adopted by the Tennessee Court of Appeals in *Champion, supra.*

ARGUMENT

I. The Federal Clean Water Act Has Not Preempted The Application Of State Law Relative To Injury Caused By Out-Of-State Water Pollution Discharges.

In determining whether the CWA preempts state law relative to interstate water pollution, three fundamental principles must be kept in mind. In the first instance, there is no doubt that the states have the power to prevent the pollution of their waters.[8] This power is preserved by the Tenth Amendment to the U.S. Constitution.[9] Second, federal preemption of this power will take place only if intended by Congress. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). Third, in those instances where the National and state governments exercise concurrent power, such as in the regulation of water pollution, the Supremacy Clause[10] will act to preempt state laws only if there is an irreconcilable conflict between the two, as when " 'compliance with both federal and state regulations is a physical impossibility....' " *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2375.

[8] In *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 498 n. 3 (1971), the basic principle recognized was that the states have inherent power to police the pollution of their waters, in the absence of a preemptive body of federal law. *See also Hillsboro County, Fla. v. Automated Med. Laboratories, Inc.,* 471 U.S. ____, ____, 105 S.Ct. 2371, 2378 (1985) (Noting that "the regulation of health and safety matters is primarily, and historically, a matter of local concern."); Glicksman, *Federal Preemption and Private Legal Remedies for Pollution,* 134 U.Pa.L.Rev. 121, 153, 204 & 207-08 (1985) (hereinafter Glicksman, *Federal Preemption*) (Noting this Court's recognition of the "quasi-sovereign" right of each state to protect its natural resources and environment from degradation from outside sources).

[9] The National government is one of enumerated powers. The reserved law-making powers of the states, however, do not derive from or depend for their existence upon, the Constitution of the United States. At least so far as that Constitution is concerned, they are inherent. *See* U.S. Const. amend. X; *United States v. Darby,* 312 U.S. 100, 124 (1941).

[10] U.S. Const. Art. VI, § 2.

As was correctly observed by the Tennessee Court of Appeals in *Champion, supra*, 25 ERC at 1340:

> 'Proper respect, therefore, for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid preemption, absent an unmistakable indication to the contrary'. *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267, 273 (3rd Cir. 1984). 'We start with the basic assumption that Congress did not intend to displace state law. Where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable'. *Matter of Quanta Resources Corp.,* 739 F.2d 912, 916 (3rd Cir. 1984) [, *aff'd sub nom. Midlantic National Bank v. New Jersey Dept. of Environmental Protection,* 474 U.S. ____, 106 S.Ct. 755 (1986)]; *see Penn Terra Ltd.,* 733 F.2d at 272-273. There is a 'presumption against preemption'. *Matter of Oswego Barge Corp.,* 664 F.2d 327, 335 (2nd Cir. 1981).

Further, where Congress intends to preempt state law, it usually says so in affirmative, clear, and explicit terms.[11] And, where Congress has not clearly stated that state law is preempted, state law is preserved "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States". *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978). In addition, "if we are left with a doubt as to congressional purpose, we should be slow to find preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' "

[11] *See, e.g.,* 7 U.S.C. § 228c (Federal Packers and Stockyards Act); 15 U.S.C. § 755(b) (Emergency Petroleum Allocation Act of 1973); 15 U.S.C. § 2617 (Toxic Substances Control Act); 17 U.S.C. § 301 (Federal Copyright Act).

Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield,* 472 U.S. ____, 105 S.Ct. 2686 (1985) (Alaska Stat. § 46.03.750(e), prohibiting oil tanker ballast discharges into Alaskan waters, was not preempted by Title II of the Ports and Waterways Safety Act of 1972, as amended by the Ports and Tanker Safety Act of 1978, 46 U.S.C. § 391a).[12]

The *amici* fail to discern any "clear and manifest" intent of Congress in the CWA to preempt state laws in the context of interstate pollution or otherwise.[13] Indeed, Congress in 33 U.S.C. § 1251(b) expressed its intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution...."[14] Toward this end, 33

[12] *See generally,* Glicksman, *Federal Preemption, supra* note 8, at 183-85 & 191-92.

[13] In Glicksman, *Federal Preemption, supra* note 8, at 138-39, 195-213 & 223, the author contends that four values — legitimacy, individual liberty, accommodation, and efficiency — are reflected either in the CWA and other federal pollution control legislation or the Constitution and are values which Congress and the courts have considered in deciding whether private remedies for pollution have been preempted. The author concludes that "State common-law actions for interstate pollution are...supported by a consideration of the four values." *Id.* at 138.

The author further concludes that "Congress did not preempt state common-law remedies for harms by expressly occupying the field of interstate pollution through the enactment of the Clean Air and Water Acts," *id.* at 197, nor has it implicitly done so. *Id.* at 198-210. *See also Stoddard v. Western Carolina Regional Sewer Auth.,* 784 F.2d 1200, 1207 (4th Cir. 1986) ("We see nothing in the Clean Water Act that presages a congressional intent to occupy the entire field of water pollution to the exclusion of state regulation."); *Ouellette, supra,* 602 F.Supp. at 269 ("[T]here is simply nothing in the Act which suggests that Congress intended to impose...limitations on the use of state law" in the interstate pollution context.).

[14] This is "Congress' express policy" in spite of "extensive federal oversight...." *Ouellette, supra,* 602 F.Supp. at 268.

U.S.C. § 1370(1) states that nothing in the CWA precludes or denies the rights of any state to adopt or enforce *not only* "(A) any standard or limitation respecting discharge of pollutants", *but also* "(B) any requirement respecting control or abatement of pollution...." (Emphasis added).

In addition, 33 U.S.C. § 1370(2) states that the CWA shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." The only possible meaning of § 1370(2) is that Congress intended to authorize the States to police the pollution of their boundary waters except when Congress "expressly" provided otherwise in the Act.[15] No other meaning can be ascribed to § 1370(2) if the statute is to be construed in light of the CWA's underlying policies, one of which is expressly stated in 33 U.S.C. § 1251(b) to preserve the inherent police powers of the states to prevent pollution.[16]

II. The *City of Milwaukee* Decision Of The Seventh Circuit Court Of Appeals Applied The Wrong Analysis And Therefore Reached An Erroneous Conclusion That The CWA Preempts State Regulation Of Interstate Water Pollution.

The petitioner, understandably, relies heavily on the decision of the Seventh Circuit Court of Appeals in *City of Milwaukee*.

---

[15] The *Ouellette* Court, 602 F.Supp. at 268, also relied upon 33 U.S.C. § 1365(e), which provides that "[n]othing in this section shall restrict any right which any person...may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." *See also Champion, supra,* 22 ERC at 1342; Glicksman, *Federal Preemption, supra* note 8, at 186-87, 197.

[16] Since the water quality protection laws of the *amici* and the CWA have the same goals — the prevention and elimination of water pollution — this Court "should be reluctant to infer preemption. '[I]t would be particularly inappropriate...because the basic purposes of the state statute and the [federal] Act are similar.'" *Chevron, U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 497.

There the Seventh Circuit ruled that the CWA preempted state law relative to regulation of out-of-state sources of pollution. That case and its erroneous holding can best be properly understood in its historical context, which involves a tortuous path of litigation spanning well over a decade.

A. *Milwaukee I*

Illinois first brought suit against the City of Milwaukee in the United States Supreme Court in 1971, invoking the "original jurisdiction" of the Supreme Court by claiming that Milwaukee was an instrumentality of the State of Wisconsin and thus, its action was one against the State of Wisconsin. *Milwaukee I,* 406 U.S. 91 (1972). At the time the suit was filed and, indeed, continuing to the present day, the City of Milwaukee was and is daily discharging thousands of gallons of untreated raw sewage into Lake Michigan and subsequently polluting the waters of Illinois. This Court declined to entertain the suit, holding that the City of Milwaukee was not a state for purposes of invoking the Court's original jurisdiction. However, the Court ruled that the City of Milwaukee could be sued in an appropriate United States District Court and created a body of federal common law to abate such a public nuisance.

The Court took the unusual step of establishing a federal common law remedy for several reasons. First, it found that the pollution of interstate waters is a legitimate federal concern. 406 U.S. at 101. Second, it found that Congress had not fully addressed in a comprehensive manner the question of interstate water pollution. Therefore, the Court felt free to create a common law remedy in the federal courts. 406 U.S. at 107. Actions to be brought thereunder were characterized as "equity suits in which the informed judgment of the Chancellor will largely govern." *Id.* The Court was careful to note, however, that future action by Congress in the field of interstate water pollution could very well abrogate the newly-created federal common law remedy. *Id.*

Though not an issue in *Milwaukee I,* and thus not decided by the Court directly, it is generally recognized that the federal common law created by the Court preempted state statutory and common law remedies otherwise applicable to interstate pollution. 406 U.S. at 107, n. 9; *Milwaukee II,* 451 U.S. at 326. Even so, the Supreme Court in *Milwaukee I* did not effect an *irreversible* displacement of state law; nor did it somehow erase state law out of existence simply by adopting a preemptive federal common law. Even when preempted by federal common or statutory law, the police power of the states to act in the field continues to *exist*. If and when the National government retires from the field, the disability that the Supremacy Clause imposes on the exercise of the inherent police powers of the states dissipates.[17]

---

[17] As long ago as *Sturges v. Crowninshield,* 4 Wheat (17 U.S.) 122 (1819), it was argued that the enactment of a national bankruptcy law which preempted state bankruptcy laws thereby permanently extinguished the power of the states in that field, even after the repeal of the federal statute. Mr. Chief Justice Marshall rejected that argument, writing:

> It has been said that Congress has exercised [its bankruptcy] power, and, by doing so, has extinguised the power of the states, which cannot be revived by repealing the law of Congress.
>
> We do not think so. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of Congress.

Id. at 196. *See also Chicago & N.W.R.R. Co. v. Fuller,* 84 U.S. 560, 568 (1873).

If Congress has no power to permanently and irreversibly displace state law, the Supreme Court surely cannot do so simply by choosing to create federal common law. Whatever preemptive effect *Milwaukee I* had on state law dissipated upon the demise of federal common law resulting from this Court's decision in *Milwaukee II,*

B. *Milwaukee II*

Illinois then proceeded to file suit against the City of Milwaukee in the United States District Court for the Northern District of Illinois, under a theory of federal common law nuisance. It also sought relief under two pendant state law claims and one at common law. Five months later, Congress enacted significant amendments to the Federal Clean Water Act, fashioning the law much as it stands today. Both the Federal District Court[18] and the Seventh Circuit[19] ruled in favor of Illinois under a theory of common law nuisance and ordered the City of Milwaukee to take corrective measures to abate the pollution. Both Courts rejected the argument of the City of Milwaukee that the extensive 1972 amendments to the Clean Water Act had obviated federal common law in the area of interstate control of water pollution. The City of Milwaukee appealed to this Court.

In *Milwaukee II,* this Court, on the second occasion that it had the case, reversed the Seventh Circuit Court of Appeals. The Court held that the 1972 Clean Water Act Amendments exhibited an intent on the part of Congress to obviate the *federal* common law in this area. Therefore, with respect to a *federal* remedy regarding interstate water pollution, the amended CWA was an agrieved party's sole recourse. The federal common law actions created by *Milwaukee I* were no longer available.

---

discussed *infra.* And, unless the CWA *itself* preempts the application of state law, the *amici* cannot be disabled from policing the pollution of their boundary waters.

[18] *Illinois v. City of Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973).

[19] *Illinois v. City of Milwaukee,* 599 F.2d 151 (7th Cir. 1979).

As to the validity of Illinois' pendant state law claims, the Court specifically declined to rule on them. 451 U.S. at 310 n.4. The Court emphasized that its decision in finding preemption of *federal* common law was based *solely* on considerations respecting the separation of powers between the legislative and judicial branches of the *National* government. Thus, as the Fourth Circuit Court of Appeals recently noted, "*Milwaukee II* decided whether the Act left room for federal common law, 'not whether that law pre-empts state law.' " *Stoddard v. Western Carolina Reg. Sewer Auth., supra,* 784 F.2d 1207 n. 9. The quite *different* considerations respecting the division of powers between the National government and the states and whether the CWA preempted state law *did not* come into play. *See* 451 U.S. at 316-17 & n. 9. The Court was careful to emphasize that "the comprehensive character of a federal statute" is "an insufficient basis to find preemption of state law" and, indeed, is not even "relevant" to the question whether *state* law can be concurrently applied. *Id.* at 319 n. 14.[20] *See also Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2377.

---

[20] The case of *Askew v. American Waterways Operators, Inc.,* 411 U.S. 332 (1973), is illustrative of this principle. That case involved, in part, the question of whether the Florida Oil Spill Prevention and Pollution Control Act, Fla. Stat. Ann. § 376.011 *et seq.*, was preempted by the Federal Water Quality Improvement Act, 33 U.S.C. § 1161 *et seq.* Although noting that "The Federal Act, to be sure, contains a pervasive system of federal control over discharges of oil" into navigable waters, 411 U.S. at 330, the Court nevertheless found the State Act not in conflict with the federal scheme and thus not preempted.

In a similar vein, this Court recently rejected the argument that the regulation of blood plasma under § 351(a) of the Public Health Service Act, 42 U.S.C. § 262(a), although "a subject of national concern", was not "an area of overriding national concern" so that preemption of local ordinances and regulations would be inferred. *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2378. *See also Chevron U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 491-92.

C. *City of Milwaukee*

The case then went back to the Seventh Circuit. On remand, the Seventh Circuit was left with addressing the alternative state law theory of recovery asserted in the District Court by the State of Illinois, which issue had been left undecided by this Court.[21] Illinois had invoked the pendant jurisdiction of the Court and argued in the alternative that Milwaukee was subject to Illinois state statutory and common laws prohibiting water pollution. The Seventh Circuit disagreed, ruling that just as the *federal common law* created by *Milwaukee I* was the exclusive remedy to abate interstate pollution prior to the 1972 CWA Amendments, the federal *statutory* (CWA) scheme is now the exclusive remedy.

The Seventh Circuit grounded its finding of preemption on its reading of *Milwaukee I* and *Milwaukee II:*

> The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the State claiming injury cannot apply its own state law to out-of-state discharges now. *Milwaukee II* did nothing to undermine that result. The claimed pollution of interstate

---

[21] It decided several other cases as well. In a related case, the Federal District Court for the Northern District of Illinois had decided the question of whether the CWA had preempted state law in two decisions with opposite results. In *Scott v. City of Hammond,* 519 F.Supp. 292, 298 (N.D. Ill. 1981), Judge Crowley of that Court ruled that there was "no doubt that the [CWA] does not preempt states from enforcing stricter controls than the Federal government on in-state polluters". Following this decision, Judge Crowley resigned and Judge Shadur of that Court, to whom the *Scott* case had been reassigned, and unaware of the prior decision, *see Illinos v. Lever Bros.,* 530 F.Supp. 293, 294 (N.D. Ill. 1981), ruled to the contrary in *Chicago Park Dist. v. Sanitary Dist. of Hammond,* 530 F.Supp. 291 (N.D. Ill. 1981). The appeal of those cases was consolidated with the remand of *Milwaukee II* to the Seventh Circuit.

> waters is a problem of uniquely federal dimensions requiring the application of federal standards both to guard states against encroachment by out-of-state polluters and equitably to apportion the use of interstate waters among competing states. Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1982 FWPCA (the governing federal law created by Congress) authorizes resort to state law.

731 F.2d at 410-411.

The logic of the Seventh Circuit is tempting, but nevertheless wrong. It starts from the arguable premise that the federal common law remedies created by *Milwaukee I* preempted or put a lid on all state law remedies to control interstate water pollution.[22] Under the Seventh Circuit's reasoning, since *Milwaukee II* displaced the judicially-created federal common law, it automatically became the new lid preventing resort to state law remedies. According to the Seventh Circuit, this is so because the "very reasons" for adopting a *preempting federal common law* dictate a *preempting federal statute*.

Here lies the pivotal error in the Seventh Circuit's rationale. The *Supreme Court's* reasons for adopting a federal common law rule cannot be imputed to the *United States Congress* when it abrogates that rule and replaces it with a statute. To determine the intent of Congress under the CWA, one must look to

[22] The District Court's rationale in *Ouellette, supra*, also erroneously appears to accept that this Court's decision in *Milwaukee I* irrevokably preempted state law in the area, with the result that the "controlling question" is the extent to which 33 U.S.C. 1365(e) and 1370 authorize resort to state law. 602 F.Supp. at 268. The *Ouellette* Court correctly concluded, however, "that the Act authorizes actions to redress injury caused by water pollution of interstate water through the laws of the state in which the injury occurred." *Id.* at 269.

the Act itself,[23] *not* policy considerations involved in this Court's creation of a federal common law remedy.[24] "Before the Supreme Court finds that state law has been preempted, however, a clear and manifest congressional purpose must be found, and the Court's analysis includes due regard for the concepts of federalism." *Stoddard v. Western Carolina Reg. Sewer Auth., supra,* 784 F.2d at 1207, *citing Milwaukee II,* 451 U.S. at 316-17, and *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Had the Seventh Circuit confined its inquiry to the CWA and the congressional intent expressed therein, it should have arrived at a different conclusion.

Furthermore, the Seventh Circuit's attempt to explain away two key provisions of the CWA is far from convincing. As noted above, 33 U.S.C. § 1370(2) provides that the CWA shall not be construed as impairing "any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." As the Court in *Bass River Associates v. Mayor, Township Commissioner,* 743 F.2d 159, 165 (3rd Cir. 1984), noted, this section "clearly shows Congress' intent *not* to preempt state anti-pollution efforts." The Seventh Circuit dismissed the clear meaning of this provision by simply concluding that "Congress intended no more than to save the right and jurisdiction of a state to regulate activity occurring *within the confines* of its boundary waters." *City of Milwaukee, supra,* 773 F.2d at 413. The Court likewise held that 33 U.S.C. § 1365(e), which provides that nothing in § 1365 restricts *any* right of relief under *any* statute or common law, preserves only "a statute or common law of the state in which the discharge occurs". 731 F.2d at 414. The Tennessee Court of Appeals

[23] When Congress' intent controls, the statutory text must be the first source consulted. *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979).

[24] *See Champion, supra,* 22 ERC at 1341.

characterized this as a "strained reading" of these two provisions. *Champion, supra,* 22 ERC at 1342.[25]

The Seventh Circuit's construction of § 1365(e) and § 1370 seems to have its foundation more in a skewered policy judgment than in the plain meaning of the CWA when it suggests, 731 F.2d at 413-14, that discharges might be forced to meet standards more stringent than those established by the permit-issuing state. That, however, the *amici* argue, is precisely the regulatory scheme that is envisioned and permitted by the CWA. To borrow from language of this Court in another context, though applicable here, "The federal interest at stake here is to ensure minimum standards, not uniform standards." *Hillsboro County, Fla. v. Automated Med. Laboratories, Inc., supra,* 471 U.S. at ____, 105 S.Ct. at 2380 n. 5 (1985).[26] Certainly, polluters should not be immunized from violations of state water quality laws and regulations simply because their industrial plant happens to be conveniently located on the other side of a state boundary.[27]

---

[25] *See also* note 15, *supra.*

[26] Indeed, as the Court in *Chevron, U.S.A., Inc. v. Hammond, supra,* 726 F.2d at 491, stated, "Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums". Further, "there is no...dominant national interest in uniformity in the area of coastal environmental regulation". *Id.* at 492. As Mr. Justice Drowota, dissenting in *Champion, supra,* 24 ERC at 1378, noted, "Nothing I have found in the FWPCA reveals a Congressional intent to establish uniform standards...." Further, "unwavering conformity to purposeless uniformity does not serve the interests of federalism or of the Commerce Clause". *Id. See also* Glicksman, *Federal Preemption, supra* note 8, at 189, 200, 208, 212-13.

[27] The Seventh Circuit likewise misses the mark when it suggests that in the context of interstate water pollution "[t]he issue is in fact 'dividing the pie,' *i.e.,* the equitable reconciliation of competing uses of an interstate body of water...." *City of Milwaukee, supra,* 731 F.2d at 410. Rather, the *amici* assert, the issue is, in fact, the elimination of pollution from the nation's navigable waters, which Congress has established as the goal of the CWA. *See* 33 U.S.C. § 1251(a)(1); *Milwaukee II, supra,* 451 U.S. at 318 ("The 'major purpose' of the [1972] Amendments was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' ").

Contrary to the Court of Appeals' suggestion that the CWA § 402, 33 U.S.C. § 1342, permitting process "seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters," 731 F.2d at 412 n. 5, the mere *availability* of the § 402 administrative process is no indication that Congress intended to *displace* any other jurisdiction or remedy of the states.[28] The process provided by § 402 for an affected state to challenge the issuance of an NPDES permit by the issuing state is exceedingly cumbersome and simply does not provide an adequate remedy for the amelioration of interstate water pollution.[29] Indeed, it is at best unclear whether a refusal by the Environmental Protection Agency to veto an issuing state's NPDES permit can be challenged in any federal court by the affected state,[30] leaving

---

[28] Indeed, 33 U.S.C. §§ 1251(b), 1365(e), and 1370 indicate the contrary.

[29] *See* Glicksman, *Federal Preemption, supra* note 8, at 166-67 ("It is not clear...that the Clean Water Act provides adequate means for a state to protect its resources from impairment by another state or its citizens.") *See also id.* at 198-199, 205-06.

[30] The Court of Appeals noted this uncertainty in *Illinois v. City of Milwaukee,* 599 F.2d 151, 160 & n. 17 & 18 (7th Cir. 1979). This Court has not decided the issue, merely stating in *Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193, 197 n. 9 (1980) (emphasis added), that such a failure to veto would "not necessarily" constitute reviewable EPA action. *See Kitlutsisti v. Arco Alaska, Inc.,* 592 F.Supp. 832, 841 n. 6 (D. Alaska 1984) ("The Supreme Court... indicated that...the EPA's failure to object to such permit may not be [subject to judicial review].").

Several cases have held there to be no review available in either the Courts of Appeals, *District of Columbia v. Schramm,* 631 F.2d 854,

those harmed in the affected state completely to the unfettered mercy of state and federal administrative authorities.

CONCLUSION

For the reasons stated above, the *amici* respectfully urge the Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

W. J. MICHAEL CODY*
Attorney General & Reporter
of the State of Tennessee

JOHN KNOX WALKUP
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General

MICHAEL D. PEARIGEN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-5687

**Counsel Of Record For Amici Curiae*

---

861 (D.C. Cir. 1980); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1290-91 (5th Cir. 1977); *Mianus River Preservation Comm. v. EPA*, 541 F.2d 899, 909 & n. 24 (2nd Cir. 1976), or in the Federal District Courts. *Schramm, supra*, 631 F.2d at 860; *Chesapeake Bay Foundation, Inc. v. U.S.*, 445 F.Supp. 1349, 1353 (E.D. Va. 1978). *But see Save the Bay, Inc., supra*, 556 F.2d at 1292-96 (District Court review available only to determine whether EPA has considered alleged violations of federal standards or has based decision on statutorily irrelevant grounds). Of the above cases, interstate pollution was involved only in *Schramm, supra*.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of true and exact copies of the foregoing Brief have been duly served by mailing, on this the 26th day of June, 1986, to the below-referenced counsel:

Honorable Charles Fried
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Roy L. Reardon
One Battery Park Plaza
New York, New York 10004
Attorney for Petitioner

Of Counsel For Petitioner:

Albert X. Bader, Jr.
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, New York 10004

James W. B. Benkard
John R. D'Angelo
Davis, Polk & Wardwell
1 Chase Manhattan Plaza
New York, New York 10005

Dinse, Erdmann & Clapp
209 Battery Street
P. O. Box 988
Burlington, Vermont 05402

Susan W. Wanat
Mid-America Legal Foundation
Suite 1725
20 North Wacker Drive
Chicago, Illinois 60606
Amicus Curiae Supporting Petitioner

Peter F. Langrock
Emily J. Joselson
Langrock, Sperry, Parker & Wool
Drawer 351
Middlebury, Vermont 05763
Attorneys for Respondents

Jeffrey L. Amestroy
Attorney General
Merideth Wright
Assistant Attorney General
Pavilion Building
Montpelier, Vermont 05602
Attorneys for State of Vermont As Class Member

MICHAEL D. PEARIGEN
Assistant Attorney General